UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 843

Case No. 930: MCGEHEE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 1 July 1996, Marie O. McGehee, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"8. ...

(d) To find and rule that the Respondent erred as a matter of law and procedure to have forcefully separated the Applicant from the Organization ...

(e) To rescind the decision of the Respondent not to retroactively reinstate and extend the Applicant's reappointment beyond three months with DHA [Department of Humanitarian Affairs] ...

(f) To find and rule that under UNGA [United Nations General Assembly] resolutions 37/126, IV para. 5 and 38/232, VI, para.5, the Applicant is entitled to a career appointment following a period of five years' satisfactory service on [a] fixed-term contract.

...

9. (a) To order the Applicant's immediate and effective retroactive reinstatement ... with the entitlement to the fundamental and essential elements of the Applicant's accumulative acquired rights and interest thereto;

(b) To order the Applicant's reimbursement of all expenses incurred, applicable allowances and benefits for the period since her separation to the date of her reinstatement;

...

(e) To find and rule that if for any reason, the Applicant is not reinstated ..., an amount of compensation substantive and sufficient to maintain the Applicant at a standard that is on average, progressively maintainable by a person of her professional experience for the remaining years of her active working life (retirement age based on international standards);

...

(g) To fix and order payment of ... damages ... for personal and moral injuries, financial and economic loss ... in the amount of six years' net base salary ...;

(h) To order payment of legal costs and ... expenses ... [in] an amount equivalent to thirty-three and one-third percent of the total claims of award to the Applicant exclusive of the awards referred to above."

Whereas the Applicant's amended plea, paragraph 9 (g), reads as follows:

"To order the payment of substantive and sufficient monetary relief and all related costs and expenses thereto, calculated on the same standard benchmark methodology as between Skylink Aviation, Inc. v. The Secretary-General (1994) under GA resolution 48/218B as claims to the Applicant for personal and moral injuries, financial and economic loss, direct adverse effects on career prospects and professional reputation in the granting of an award of 6 years' net base salary in view of the exceptional and special circumstances of the case."

Whereas, on 1 July 1996, the Applicant requested the President of the Tribunal to grant an expedited hearing of the case, which request was denied on 17 September 1996, and also requested the production of documents;

Whereas the Respondent filed his answer on 11 October 1996;

Whereas the Applicant filed written observations on 5 November 1996;

Whereas, on 26 March 1997, the Applicant submitted an amendment to her application;

Whereas, on 22 April 1997, the Respondent submitted his comments on the Applicant's amended pleas and on the Applicant's request for the production of documents;

Whereas, on 8 May 1997, the Applicant submitted comments on the Respondent's submission of 22 April 1997 and requested oral proceedings in the case;

Whereas, on 8 August 1997, the Tribunal requested the Respondent and the Applicant to provide it with answers to certain questions and informed the parties that the Tribunal had decided to adjourn its consideration of the case until its next session;

Whereas, on 12 September 1997, the Applicant provided partial answers to the questions posed by the Tribunal;

Whereas, on 15 September 1997, the Respondent provided answers to the questions posed by the Tribunal;

Whereas, on 22 September 1997, the Respondent submitted comments on the Applicant's response of 12 September 1997;

Whereas, on 13 and 20 October 1997, the Applicant reiterated her request for the production of documents;

Whereas, on 3 and 14 November, the Tribunal requested the Applicant to specify the documents requested, but did not receive a reply;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 15 August 1986, on a short-term contract as a clerk at the G-3 level. On 21 December 1986, the Applicant's appointment was converted to fixed term. Thereafter, she served on a series of fixed-term appointments with the Department of Public Information as a Public Information Clerk. On 15 March 1988, she was transferred to UNDP as a Bilingual Secretary. On 5 April 1989, she was assigned on mission to the United Nations Transition Assistance Group in Namibia as an Information Assistant at the G-3 level, where she remained until 2 May 1990, when she returned to UNDP Headquarters. On 1 January 1991, the Applicant was promoted to the G-4 level. From 9 July 1991, she served as Programme Assistant, at the G-5 level, in the United Nations Office for the Coordination of Humanitarian Assistance (UNOCHA) to Afghanistan, in the Department of Humanitarian Affairs (DHA), in Geneva. On 1 January 1992, she became an Administrative Assistant at UNOCHA, Geneva, serving at the G-5, step IV level. On 1 April 1992, the Applicant became a Senior Personnel Administrative Assistant. On 4 April 1992, she was assigned to the United Nations Protection Force (UNPROFOR) in Yugoslavia as Press and Information Officer. She was given a special post allowance to the P-1 level, which would last until the end of her UNPROFOR assignment. Her department agreed to release her for an initial period of one year, which was followed by an extension, on 1 July 1993, for a further six month period. The Applicant was promoted to the G-6, step IV level, with effect from 1 August 1992. When released from UNOCHA, she was on a fixed-term contract.

On 30 September 1993, the Officer-in-Charge, General Service Staffing Section, Office of Human Resources Management (OHRM), wrote to Personnel Services, Geneva, requesting that the Applicant's assignment with UNPROFOR be extended for a further year, to 4 October 1994. In a reply dated 6 October 1993, the Chief,

Administration and Finance, UNOCHA Geneva, stated that, since the mandate for UNOCHA was due to expire on 31 December 1993, he had no authority to make any commitments beyond 31 December 1993. The Applicant's appointment with UNOCHA expired on 31 December 1993. On 1 January 1994, her fixed-term appointment with UNPROFOR was extended until 4 October 1994. The Applicant separated from service on 5 October 1994.

On 29 October 1993, the Applicant wrote to the Personal Representative of the Secretary-General, UNOCHA, Islamabad, indicating her desire to return to her post in Geneva.

On 29 November 1993, the Chief, Administration and Finance, UNOCHA Geneva, informed the Applicant that her previous post was scheduled for abolition on 1 January 1994 and that UNOCHA would not be in a position to offer her a post beyond 31 December 1993.

On 13 December 1993, the Applicant wrote to the Chief, General Services, OHRM, New York, stating that she had not been consulted about the "unilateral arrangement" to extend her assignment in UNPROFOR "until 31 [sic] October 1994". She requested re-assignment to her duty station in UNOCHA, Geneva. On 30 December 1993, the Applicant wrote to the Director, DHA, in New York, again raising the issue of her return to Geneva. She referred to a discussion she had had with the Director, DHA, in which an understanding was reached that, pending the reorganization of UNOCHA Geneva, the Applicant would be given a three month fixed-term contract.

In a reply dated 14 January 1994, the Director, DHA, New York, expressed regret "that so much inconvenience has been caused to you in view of the lack of clarity regarding the status of your post within [the] UNOCHA structure and assignment upon your return from secondment with UNPROFOR. ... This is, therefore, to confirm the above [agreement to give the Applicant a three month fixed-term contract in Geneva] and to let you know that you should report to [the Chief, Administration and Finance, UNOCHA] in Geneva. While as

a result of the restructuring the specific post has been curtailed, [the Chief, Administration and Finance, UNOCHA Geneva] has the necessary instructions to accommodate you within the programme for the specified period."

In a memorandum dated 28 January 1994, the Chief, Administration and Finance, UNOCHA Geneva, asked Personnel Services, Geneva, to recruit the Applicant on a three-month fixed-term appointment at the G-6 level. However, no recruitment action was undertaken by Personnel Services, Geneva. During the course of an investigation by the Office of Internal Oversight Services (OIOS), OIOS inquired why no recruitment action had been initiated. It was told that the Chief, Administration and Finance, UNOCHA Geneva, had withdrawn the request for the Applicant's recruitment a few days after it had been made on the basis of a conversation with the Applicant in which she had allegedly told him that she had decided to remain with UNPROFOR.

When OIOS asked the Chief, Administration and Finance, UNOCHA Geneva, for an explanation, he stated that in a telephone conversation with the Applicant, she had informed him of her decision to remain with UNPROFOR, where she in fact remained until 5 October 1994, her last day of service with the United Nations. The Applicant denied that such a conversation ever took place.

In a memorandum dated 3 February 1994, the Chief Civilian Personnel Officer asked the Applicant to agree to an extension of her UNPROFOR assignment. In a reply dated 16 February 1994, the Applicant stated that she "was due to return to [her] parent organization starting January 1994, however to date, UNOCHA Geneva could not identify any suitable post. In light of the above, [the Applicant] w[ould] remain with UNPROFOR ..."

On 9 November 1994, the Applicant wrote to the Under-Secretary-General, OIOS, requesting an "immediate investigation" of her "alleged" termination with UNOCHA, Geneva.

OIOS adopted its report on 21 June 1995. Its conclusions and recommendations read, in part, as follows:

> "16. After reviewing all the pertinent facts, and talking to the principals by phone, it is our conclusion that [the Chief, Administration and Finance, UNOCHA Geneva] did in fact drag his feet when asked by his superiors to accommodate the staff member within the programme and did not implement instructions from [the Director, DHA, New York] to accommodate the staff member. As a result, the desired goal of affording the staff member the opportunity to return to her post in Geneva and hopefully using that chance to identify another suitable post within the UN, was lost.
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> ...
>
> VII. RECOMMENDATION
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> 19. Our review of the correspondence from [the Chief, Personnel Services, Geneva] and the Director, DHA, New York] expresses a need to assist the staff member find a suitable post in Geneva. We believe that under circumstances where a staff member was prevented from protecting her own best interests by the actions of a supervisor, the Organization has an obligation to help restore the staff member to her original position. We therefore recommend that Personnel Services, Geneva, proceed to do so.
>
> 20. Because we have no way of knowing what [the Chief, Administration and Finance, UNOCHA Geneva]'s motives were in failing to proceed with [the Applicant]'s recruitment, and since our conclusion in this regard can only be inferred from his conduct, we are reluctant to recommend disciplinary action under these circumstances. It is however obvious that his conduct had the effect of frustrating his own supervisor's wishes and instructions. Therefore, the decision whether any sanctions are appropriate should be determined by the officials whose instructions were not followed."

On 6 September 1995, the Chief, Investigations Unit, OIOS, wrote to the Applicant, enclosing a copy of the OIOS report and advising her that "the Under-Secretary-General for Humanitarian Affairs has notified OIOS formally on this date that he does not accept our recommendations."

On 11 September 1995, the Applicant wrote to the Secretary-General, objecting to the refusal of the Under-Secretary-General, DHA, to accept the recommendations made by OIOS.

On 10 October 1995, the Assistant Secretary-General, OHRM, wrote to the Applicant, noting that "[i]t is, however, my understanding that UNOCHA/DHA has agreed to assist [the Applicant] in finding a suitable post in Geneva."

On 13 December 1995, the Applicant wrote to the Secretary-General concerning the non-implementation of the OIOS recommendations.

On 23 May 1996, the Applicant wrote to the Principal Officer, General Legal Division, Office of Legal Affairs, advising the latter of her wish "to proceed immediately to put the ... claims of this matter to the United Nations Administrative Tribunal for their adjudication as expeditiously as possible." On 24 May 1996, the Respondent replied, confirming that "we agree about the direct submission of the case to the Administrative Tribunal."

On 1 July 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to extend the Applicant's fixed-term contract, as well as the Respondent's failure to implement the OIOS recommendations, were tainted by extraneous considerations, marred by irregularities of law, fact and procedure and violated Article 101 of the UN Charter.

2. The Applicant is entitled to a career appointment following a period of five years' satisfactory service on fixed-term contracts.

Whereas the Respondent's principal contention is:

Fixed-term appointments expire on the date specified therein. The Applicant's appointment expired on that date and that expiration did not violate her rights.

The Tribunal, having deliberated from 11 to 24 July 1997 in Geneva and from 27 October to 25 November 1997 in New York, now pronounces the following judgement:

I. The Applicant has presented a number of claims, which can be divided into two categories: (I)"Constitutional" claims relating to the authority or responsibility of the Respondent to institute or accede to proceedings in national courts in respect of certain matters; and (ii) substantive claims relating to the Respondent's non-renewal of the Applicant's fixed-term appointment. As to those claims that the Applicant characterizes as "constitutional" claims, the Tribunal is of the view that it is neither necessary nor proper to address those claims in order to resolve the fundamental question raised by the Applicant. Despite the complicated and intemperate manner in which the Applicant's claims have been presented by counsel, the issues before the Tribunal are quite straightforward. First, did the Secretary-General err in not implementing the recommendations of the Office of Internal Oversight Services (OIOS)? Second, did he err in not renewing the Applicant's fixed-term appointment?

II. Most of the facts relevant to the resolution of this matter are not in dispute. In April 1992, the Applicant held a fixed-term contract at the G-6 level in UNOCHA/DHA, and was serving on a temporary assignment to the United Nations Protection Force in Yugoslavia. In October 1993, the Applicant requested to return to her post in Geneva. A month later, she was informed that her post

was scheduled to be abolished with effect from 1 January 1994, and that UNOCHA could not offer her a position beyond 31 December 1993. In early January 1994, the Applicant was informed by the Head of her department at UNOCHA that she could be given a three-month appointment in Geneva, which would end on 31 March 1994.

III. The Applicant and the Respondent disagree about the events that occurred thereafter. The Applicant's immediate supervisor at UNOCHA requested Personnel Services to recruit the Applicant on a three-month fixed-term appointment. He later withdrew this request, allegedly after being told by the Applicant, in a telephone conversation, that she had decided to stay with UNPROFOR. The Applicant denies that she had such a conversation with her supervisor, or that she made a request of anyone to remain with UNPROFOR. Subsequently, the Applicant's appointment was extended through 5 October 1994.

IV. On 9 November 1994, the Applicant filed a complaint and requested an investigation by the OIOS, alleging that her supervisor "undertook certain questionable measures to seriously delay and impede the Applicant's return to her parent office UNOCHA/DHA, Geneva". The OIOS conducted an investigation and issued a report that concluded that "under the circumstances where a staff member was prevented from protecting her own best interests by the actions of a supervisor, the Organization has an obligation to help restore the staff member to her original position. We therefore recommend that Personnel Services, Geneva proceed to do so." In addition, the OIOS report concluded that since the supervisor's motives in failing to proceed with recruitment "can only be inferred from his conduct, we are reluctant to recommend disciplinary action" and "the decision whether any sanctions are appropriate should be determined by the official(s) whose instructions were not followed".

V. The Applicant requests the Tribunal to find that the Secretary-General erred in failing to implement the recommendations of the OIOS. The Tribunal draws the Applicant's attention to Paragraph (iv) "Investigation" of General Assembly resolution 48/218B, which states that OIOS shall "transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken." The Applicant asserts that the recommendations of the OIOS are mandatory and must be implemented by the Secretary-General. The Tribunal notes that the clear language of the General Assembly resolution is that OIOS makes recommendations for consideration by the Secretary-General. The Secretary-General has the responsibility to decide whether to implement the recommendations of the OIOS. In the matter at hand, the OIOS Report recommended that the Applicant be placed in her "original position". It left to DHA the determination of whether disciplinary action should be taken against the Applicant's supervisor. The Tribunal considers that the Applicant's "original position" is that existing prior to the time of the alleged telephone conversation, on the content of which the Applicant and the Respondent disagree.

VI. The Tribunal has accepted this application as a result of the agreement between the Applicant and the Respondent to submit the case directly to the Tribunal. The Tribunal draws the Respondent's attention, however, to the improper procedures followed by the Applicant in respect of her claims relating to the non-renewal of her appointment. The Applicant should have directed the original complaint about the non-renewal of her appointment and the evidence relating to this claim to the Joint Appeals Board, rather than to the OIOS.

VII. The Tribunal has reviewed in detail the mandate of and the procedures employed by the OIOS and concludes that the OIOS is not the proper administrative body to consider the personnel matter raised by the Applicant. Investigation of the conduct of the Applicant's supervisor may have been properly presented to the OIOS as an example of "mismanagement", but the OIOS is not constituted to conduct reviews of personnel matters that involve factual disputes between a staff member and the Secretary-General. Proper administrative review that includes appropriate due process safeguards can only be conducted by a body established for that purpose. The Joint Appeals Board operates according to procedures set forth in the Staff Rules and Regulations that provide the due process protection necessary to make recommendations on personnel disputes.

The Tribunal notes that, in response to questions posed by the Tribunal, OIOS has acknowledged that subsequent to the closure of the investigation of the Applicant's complaint, procedures were put into place that address due process concerns. According to OIOS, under the new procedures, "it is likely that no investigation would be initiated and the staff member would be referred directly to UN review bodies such as the JAB".

VIII. The Tribunal finds that the Applicant's claim relating to non-renewal of her fixed-term appointment should have gone to the JAB. It therefore remands the case to the JAB (cf. Judgements No. 304, Moser (1983) and No. 808, Wheeler (1997)). The Tribunal notes that the Applicant has requested the production of documents, but has failed repeatedly to respond to the Tribunal's request that she specify these documents. The Tribunal assumes that the documents the Applicant seeks relate to her substantive claim regarding the non-renewal of her appointment and finds that this request is therefore not properly before the Tribunal at this time.

IX. The Tribunal expresses its displeasure with the manner in which the Applicant's counsel presented her case and with the language of both the pleadings and communications with the Tribunal. The language of the Applicant's submissions transcended the bounds of civil discourse that is expected in all judicial and administrative proceedings. Not only was the Applicant's case presented in a manner that was not in keeping with the dignity of the proceedings, but it also did not serve her best interests.

X. For the foregoing reasons, the Tribunal orders that:

1) The Applicant's claim relating to the non-renewal of her fixed-term appointment be remanded to the JAB; and

2) The remaining claims be rejected.

The Tribunal also decides to reject the request for an oral hearing.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 26 November 1997

R. Maria VICIEN MILBURN
Executive Secretary